OCBC Bank (M) Bhd v Sethu a/l Ambalagara Thevar

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-03-12 OF 1997
LAMIN PCA, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
22 JUNE 1998

Bankruptcy *— Petition — Petition heard two years after bankruptcy notice was served — Judgment debtor tendered amount stated in bankruptcy notice — Petitioning creditor refused to accept because amount of debt due under bankruptcy notice had been inflated due to non-payment of interest — Whether petitioning creditor had right to refuse to accept amount tendered — Whether judgment debtor committed act of bankruptcy — Whether petition should be dismissed*

The petitioning creditor took out a bankruptcy notice and served it on the judgment debtor in 1993. In that bankruptcy notice, it was stated that the judgment debtor owed the petitioning creditor the sum of RM55,211.37. When the petition finally came up for hearing before the senior assistant registrar two years later, the judgment debtor tendered two banker's drafts for the total sum of RM55,211.37. The petitioning creditor refused to accept the banker's drafts stating that at the time when the banker's drafts were tendered, the amount of the debt due under the bankruptcy notice had been inflated due to the non-payment of interest. The senior assistant registrar dismissed the petition on the ground that the judgment debtor was solvent. On appeal to the High Court judge, the judge also found that the judgment debtor was solvent and stated that there were evidence to show that the judgment debtor owned assets more than the amount stated in the bankruptcy notice. The petitioning creditor appealed.

Held, dismissing the appeal:

(1) There is no necessity to find out whether the judgment debtor had assets more than the amount stated in the bankruptcy notice. When the judgment debtor tendered the two banker's drafts amounting to RM55,211.37 which was the sum stated in the bankruptcy notice, the sum in the notice had been satisfied. The petitioning creditor had no right to refuse to accept those banker's drafts since the full amount in the notice had been tendered. That payment also proved that the judgment debtor was solvent (see p 773B–D).

(2) The bankruptcy notice served on the judgment debtor was a notice to him that he owed the petitioning creditor the amount stated in the notice. That amount must be settled within seven days after the notice had been served on him. If he failed to do so, then he had committed an act of bankruptcy. As such, it is important that the notice must specify the amount due. If the judgment debtor is able to settle the full amount stated in the

bankruptcy notice, he has not committed an act of bankruptcy. If he tenders the full amount as stated in the bankruptcy notice, the petitioning creditor is obliged to accept that amount as full settlement of the sum owing under the said bankruptcy notice and the petitioning creditor could not petition for a receiving order. The right to present the petition only arise once an act of bankruptcy has been committed (see pp 773H–I, 775H and 776B).

Obiter:

After the bankruptcy notice had been served on the judgment debtor, no negotiation whatsoever should take place. A bankruptcy proceeding is the final resort open to a creditor because all other avenues to recover the debt had been closed. Hence no negotiation should take place. Courts below should take note of r 127 of the Bankruptcy Rules 1969. It should be adhered to strictly and an adjournment of not exceeding one month be allowed only once. An adjournment is not really necessary because the proceedings have reached the last and final stage. If a judgment debtor is unable to pay the amount stated in the bankruptcy notice, he should be made a bankrupt without further ado (see p 776G and 777D).

[**Bahasa Malaysia summary**

Si piutang mempetisyen mengambil notis kebankrapan dan menyampaikannya kepada penghutang penghakiman dalam tahun 1993. Dalam notis kebankrapan itu dinyatakan bahawa penghutang penghakiman berhutang dengan si piutang mempetisyen jumlah sebanyak RM55,211.37. Apabila petisyen itu akhirnya dibawa untuk pembicaraan di hadapan penolong kanan pendaftar dua tahun kemudian, penghutang penghakiman menyerahkan dua draf bank untuk jumlah RM55,211.37. Si piutang mempetisyen enggan menerima draf bank itu dan menyatakan bahawa pada masa draf bank itu diserahkan, jumlah hutang di bawah notis kebankrapan itu telah meningkat kerana kegagalan membayar faedah. Penolong kanan pendaftar menolak petisyen atas alasan bahawa penghutang penghakiman adalah solven. Atas rayuan kepada hakim Mahkamah Tinggi, hakim itu juga mendapati penghutang penghakiman adalah solven dan menyatakan bahawa terdapat bukti untuk menunjukkan bahawa penghutang penghakiman memiliki aset melebihi jumlah yang dinyatakan dalam notis kebankrapan. Si piutang mempetisyen membuat rayuan.

Diputuskan, menolak rayuan:

(1) Tidak perlu ditentukan sama ada penghutang penghakiman memiliki aset melebihi jumlah yang dinyatakan dalam notis kebankrapan. Apabila penghutang penghakiman menyerahkan draf bank berjumlah RM55,211.37 yang merupakan jumlah yang

dinyatakan dalam notis kebankrapan itu, jumlah dalam notis itu telah dipenuhi. Si piutang mempetisyen tidak mempunyai hak untuk menolak draf bank itu kerana jumlah penuh dalam notis itu telah diserahkan. Bayaran itu juga membuktikan bahawa penghutang penghakiman adalah solven (lihat ms 773B–D).

(2) Notis kebankrapan yang disampaikan ke atas penghutang penghakiman adalah satu notis kepadanya bahawa dia berhutang dengan si piutang mempetisyen jumlah yang dinyatakan dalam notis itu. Jumlah itu mesti diselesaikan dalam masa tujuh hari selepas notis itu disampaikan ke atasnya. Jika dia gagal berbuat demikian, dia telah melakukan perbuatan kebankrapan. Oleh itu, adalah penting bahawa notis itu mesti menentukan jumlah yang terhutang. Jika penghutang penghakiman berupaya untuk menyelesaikan jumlah penuh yang dinyatakan dalam notis kebankrapan itu, dia tidak melakukan perbuatan kebankrapan. Jika dia menyerahkan jumlah penuh seperti yang dinyatakan dalam notis kebankrapan, si piutang mempetisyen mesti menerima jumlah itu sebagai penyelesaian penuh jumlah yang terhutang di bawah notis kebankrapan dan si piutang mempetisyen tidak boleh mempetisyen perintah penerimaan. Hak untuk mengemukakan petisyen itu hanya timbul apabila satu perbuatan kebankrapan telah dilakukan (lihat ms 773H–I, 775H dan 776B).

Obiter:
Selepas notis kebankrapan disampaikan ke atas penghutang penghakiman, apa-apa perundingan tidak patut diadakan. Prosiding kebankrapan adalah jalan terakhir yang terbuka kepada si piutang kerana semua cara lain untuk mendapatkan hutang telah tertutup. Oleh itu perundingan tidak sepatutnya diadakan. Mahkamah bawah patut mengambil perhatian kepada peraturan 127 Peraturan-Peraturan Kebankrapan 1969. Ia patut dipatuhi dengan ketat dan penangguhan tidak melebihi satu bulan dibenarkan hanya sekali. Penangguhan tidak begitu perlu kerana prosiding telah mencapai peringkat akhir dan muktamad. Jika penghutang penghakiman tidak berupaya untuk membayar jumlah yang dinyatakan dalam notis kebankrapan itu, dia patut dijadikan seorang bankrap tanpa berlengah-lengah lagi (lihat ms 776G dan 777D).]

Notes

For cases on petition, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1486–1531.

Cases referred to

Ghazali bin Mat Noor v Southern Bank Bhd and four other appeals [1989] 2 MLJ 142 (refd)

Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263 (refd)

Legislation referred to

Bankruptcy Act 1967 s 3(1)
Bankruptcy Rules 1969 r 127

Appeal from: Bankruptcy No 29–603 of 1993 (High Court, Ipoh)

Yoong Sin Min (*Lau May Ling* with her) (*Shook Lin & Bok*) for the appellant.

VS Viswanathan (*TH Su & Co*) for the respondent.

Mokhtar Sidin JCA (delivering judgment of the court): We have dismissed the appeal earlier and now we give our reasons for doing so.

In this appeal the appellant/petitioning creditor ('the petitioning creditor') petitions the court that a receiving order may be made in respect of the estate of Sethu a/l Ambalagara Thevar ('the judgment debtor') and an adjudication order be made against the judgment debtor. There was no dispute that as at 5 August 1993 the said judgment debtor owed the petitioning creditor the sum of RM55,211.37. This sum arose from a consent judgment entered on 22 June 1992 providing for interest at 18% pa on monthly basis and also delinquent charge at one percent on the total minimum payment, as stipulated in the judgment debtor's monthly statement of account. The petitioning creditor took out a bankruptcy notice and served it on the judgment debtor on 28 September 1993. In that bankruptcy notice it was stated that the judgment debtor owed the petitioning creditor the sum of RM55,211.37. For reasons best known to the parties, the petition was not heard within the time as provided for by the Bankruptcy Act 1967. We will comment on this later in our judgment.

Before the actual hearing of the petition before the senior assistant registrar, the judgment debtor filed an affidavit to oppose the petition claiming that he was solvent and adducing evidence that he owned land to the value of RM9,227,755. When the petition finally came up for hearing before the senior assistant registrar, the judgment debtor tendered two banker's drafts for the total sum of RM55,211.37. This was the amount stated in the bankruptcy notice. The petitioning creditor refused to accept the banker's drafts stating that at the time when the banker's drafts were tendered, the amount of the debt due under the bankruptcy notice had been inflated due to the non-payment of the interest and as such the amount due on the date when the banker's drafts were tendered was RM99,797.89.

The senior assistant registrar dismissed the petition on the ground that the judgment debtor was solvent. On appeal to the High Court judge, the learned judge also found that the judgment debtor was solvent. The learned judge in his judgment stated that there were evidence to show that the judgment debtor owned assets amounting to more than RM9,227,755 and the petitioning creditor had not shown any evidence to the contrary. The learned judge dismissed the appeal by the petitioning creditor. Being dissatisfied with that decision, the petitioning creditor now appeal to us. Hence the present appeal before us.

Before us, both parties argued on the assumption that the main and only issue to be decided was whether the judgment debtor was solvent because of the value of his assets. Both counsel went at great length to satisfy us that the judgment debtor had sufficient assets to satisfy the debt to show that he is solvent. We agree that the question of solvency is important at the time when the act of bankruptcy was committed. In our view, for the purpose of this appeal there is no necessity to find out whether the judgment debtor had assets more than the amount stated in the bankruptcy notice or the amount claimed by the petitioning creditor at the time of the hearing of the petition. It appears to us that when the judgment debtor tendered the two banker's drafts amounting to RM55,211.37 which was the sum stated in the bankruptcy notice, then the sum in the notice had been satisfied. The petitioning creditor had no right to refuse to accept those banker's drafts since the full amount in the notice had been tendered. That payment also proved that the judgment debtor was solvent. For that reason we would like to refer to s 3(1) of the Bankruptcy Act 1967:

> (1) A debtor commits an act of bankruptcy in each of the following cases:
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> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, *a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of the bankruptcy notice or to secure or compound for it to the satisfaction of the creditor or the court*; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:
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> Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order; ... . (Emphasis added.)

We are of the view that the bankruptcy notice is important and the key to the whole of the proceedings for bankruptcy. The bankruptcy notice served on the judgment debtor was a notice to him that he owed the petitioning creditor the amount stated in the notice. That amount must be settled within seven days after the notice had been served on him. If he failed to do so then he had committed an act of bankruptcy. As such, it is important that the notice must specify the amount due. It was so decided by the Supreme Court in the case of *Ghazali bin Mat Noor v Southern Bank Bhd and four other appeals* [1989] 2 MLJ 142 where it was held that:

(1) *For a bankruptcy notice to be valid it should state the exact amount due at the date of the bankruptcy notice. The judgment debtor must know the exact amount he has to pay to avoid bankruptcy.* He does not have to make calculations or enquiries.

(2) In the present appeals, as the interest sums payable have not been quantified, the bankruptcy notice in all five cases are invalid ab initio and consequently all subsequent proceedings to these bankruptcy notices are a nullity. (Emphasis added.)

This decision followed an earlier decision of the Supreme Court in the case of *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 where it was held that:

(2) *By demanding payment for unspecified sums in the bankruptcy notice, such demand is not in accordance with the terms of the judgment and applying the rule of strict construction, the notice cannot be deemed to fall within s 3(1)(i) of the Bankruptcy Act 1967. The amount must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven-day period.* Non-compliance with the terms of the judgment renders the bankruptcy notice invalid, and failure to comply with such a notice is not an act of bankruptcy and a bankruptcy petition founded on it must necessarily fail;

(3) it cannot be disputed that the whole of the judgment for the repayment of the principal sum of the loan, interest and costs, on which the bankruptcy notice was founded, did not exist as a debt available for bankruptcy purposes at the time of the alleged act of bankruptcy and that being the case, the bankruptcy notice was a nullity ab initio and and the appellant is entitled to succeed. (Emphasis added.)

Mohamed Azmi SCJ (as he then was) at p 265 said:

> It is also essential that at the time of issue of the bankruptcy notice, the judgment creditor must be in the position to issue execution — see *In re Woodall, ex p Woodall* (1884) 13 QBD 479. If part of the debt has been paid or unenforceable in bankruptcy, the notice can only be issued for the balance — see *Re A Debtor* (No 21 of 1937) [1938] 2 All ER 824. Thus, a bankruptcy notice can only be issued for the judgment debt or that part of the debt on which the creditor can issue execution. In the present case, as at the date of issue of the bankruptcy notice, only in respect of that part of the judgment debt of $2,325,000 the creditor could have issued execution. The remaining parts of the judgment debt on the interest on the loan and the costs of proceedings had not been quantified in accordance with the terms of the judgment, and hence these parts of the judgment debt were then incapable of being the subject of execution. *In our view, the demand for payment of interest and costs was wrongly included in the bankruptcy notice because it was only after the issue of the notice, ie when the creditor's petition was issued on 6 January 1986* that the creditor was able to ascertain the base lending rate of '10.25%' pa, and also to quantify the costs at $9,880.50 after taxation. Clearly, the bankruptcy notice was bad in law as it contained demand for payment of the whole judgment debt within seven days when parts of the whole debt had not been or could not be quantified, and as such were incapable of being made the subject of execution, and consequently

A incapable of being complied with. Non-compliance with the demand to pay such unascertained sums cannot constitute an act of bankruptcy. *The demand for repayment in the notice must not only be quantified but must also be the correct sum owing as at the date of the notice.* In the circumstances, the bankruptcy notice should have made it clear that the demand for payment was limited only to the principal sum of $2.325m, or both the interest and the costs B should have been left out altogether and when their amounts had been ascertained, they could, before adjudication, be made the subject of a separate bankruptcy notice. Alternatively, both the interest and the costs should be quantified first before notice was issued on the whole judgment debt. In any event, any balance of a judgment debt, including interest and costs not demanded in the notice, could subsequently be proved in C bankruptcy to the Official Assignee under Pt III of the Bankruptcy Act. (Emphasis added.)

At p 266, his Lordship went on to say:

> ... The Bankruptcy Act provides expressly that the notice must be to pay the judgment debt 'in accordance with the terms of the judgment'. Thus, in *Re* D *HB* [1904] 1 KB 94 a bankruptcy notice was held to be bad if founded not according to its terms but on some agreement which modified the terms of the judgment, and therefore not in accordance with the terms of the judgment. Consequently, we are of the view that when you have the judgment in the usual form that we have here, *a bankruptcy notice under the Act must require payment of quantified sum or sums alleged to be due according to the terms of the* E *judgment as at the date of issue of bankruptcy notice.* The duty is on the creditor to state the correct amount due, and there is no obligation imposed on the debtor to make inquiries if the amount demanded is ambiguous or unascertained. By demanding payment for unspecified sums in the bankruptcy notice, we hold that such demand is not in accordance with the terms of the judgment, and applying the rule of strict construction, the F notice cannot be deemed to fall within s 3(1)(i) of the Bankruptcy Act. *The amount must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven-day period.* Non-compliance with the terms of the judgment renders the bankruptcy notice invalid, and that failure to comply with such notice is not an act of bankruptcy, and a G bankruptcy petition founded on it must necessarily fail. (Emphasis added.)

From the above, it is clear to us that the amount in the bankruptcy notice must be quantified and specified. The reason is that the judgment debtor must be given the opportunity to raise that sum within the period stipulated in the bankruptcy notice. In our view, if the judgment debtor is able to H settle the full amount stated in the bankruptcy notice he has not committed an act of bankruptcy. If he tenders the full amount as stated in the bankruptcy notice, the petitioning creditor is obliged to accept that amount as full settlement of the sum owing under the said bankruptcy notice and the petitioning creditor could not petition for a receiving order. If the petitioning creditor refuses to accept the amount he does so at his own I peril. In our view the payment of the full amount as stated in the bankruptcy notice is the best evidence that the judgment debtor is solvent. Thus in the present appeal when the judgment debtor tendered the two banker's drafts

for the full amount in the bankruptcy notice (which was not disputed by the appellant/petitioning creditor), the judgment debtor had satisfied the court that he was solvent. It does not matter whether the petitioning creditor accepted them or not but the obligation on the part of the judgment debtor under that bankruptcy notice had been met and he had not committed an act of bankruptcy. Since he had not committed an act of bankruptcy there was no right given to the petitioning creditor to present the petition for receiving order. In our view, the right to present the petition only arise once an act of bankruptcy has been committed.

The petitioning creditor explained that it refused to accept the two banker's drafts because the amount in the bankruptcy notice was not the total amount due from the judgment debtor any more. It is not disputed that some two years had already passed from the time when the bankruptcy notice was served on the judgment debtor to the time when the two banker's drafts were presented. Because of the two year period the amount of interest on the judgment debt had accumulated and as on the date when the banker's drafts were presented the total sum due was RM99,797.89. We are not denying that the petitioning creditor is entitled to that amount but the question before us is what was the amount due under the bankruptcy notice in order to start the whole machinery of bankruptcy against the judgment debtor. As far as we are concerned the amount in the bankruptcy notice was the amount in the two banker's drafts. If the petitioning creditor (appellant) wanted a figure higher than the one in the notice, it should have withdrawn the bankruptcy notice and file a new bankruptcy notice stating the new amount and serve it on the judgment debtor. By doing so the judgment debtor has to settle the new amount as in the new notice. Until that is done, the amount due from the judgment debtor was the amount in the notice, that was RM55,211.37 and that amount was tendered by the judgment debtor through the two banker's drafts.

Counsel for both parties admitted there was a delay of two years from the time the bankruptcy notice was served to the time when the petition was heard. The reason given was that there were negotiations between the parties. We were of the view that after the bankruptcy notice had been served on the judgment debtor no negotiation whatsoever should take place anymore. We are of the opinion a bankruptcy proceeding is the final resort open to a creditor because all other avenues to recover the debt had been closed. Hence no negotiation should take place. Once the bankruptcy notice is served, either the judgment debtor pay the amount in the notice in full or face the consequences of being made a bankrupt. That is why in its wisdom the Act provides that the petition must be heard promptly and r 127 of the Bankruptcy Rules 1969 provides for that. Rule 127 provides as follows:

> Adjournments of hearing
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> *After the expiration of one month from the day appointed for the first hearing of a petition* (provided such petition shall have been duly served) *no further adjournment of the hearing merely by consent of the parties shall be allowed* unless the debtor has given prior notice that he intends to show cause against the petition; *but in every such case unless an order for adjournment is made the Court shall either make a receiving order or dismiss the petition.* (Emphasis added.)

A As can be seen from the above only an adjournment of not exceeding one month is allowed. It does not matter whether all the parties agreed to further adjournments; no further adjournments should be allowed. The only exception to this is when the judgment debtor gives notice to challenge the petition itself. In the present appeal, the judgment debtor did not give notice to challenge the petition at the beginning when the bankruptcy notice was served on him. He only challenged the petition at the time just before the petition was heard by the senior assistant registrar. We see no reason why there must be delay in this case. In our view, if r 127 has been followed strictly, we are sure that the problems faced by the petitioning creditor would not arise for the simple reason that an adjournment of one month will not alter the amount in the notice very much.

We would like to stress here that courts below should take note of r 127 of the Bankruptcy Rules. It should be adhered to strictly and an adjournment of not exceeding one month be allowed only once. In our view, an adjournment is not really necessary because the proceedings have reached the last and final stage. If a judgment debtor is unable to pay the amount stated in the bankruptcy notice, he should be made a bankrupt without further ado.

Thus in the present appeal, when the judgment debtor tendered the two bank drafts for the full amount in the bankruptcy notice, he had done the obligations imposed upon him by the bankruptcy notice and the Bankruptcy Act. As such, he had tendered the full amount due from him under the bankruptcy notice which showed that he was solvent. He should not be made a bankrupt and it did not matter whether the petitioning creditor refused to accept the bank drafts or not.

We are in agreement with the senior assistant registrar and the learned judge that the petition be dismissed but for different reasons. We are of the view that when the judgment debtor tendered the two banker's drafts that was ample and sufficient evidence to show that the judgment debtor was solvent without going into the personal assets of the judgment debtor as the learned judge and the senior assistant registrar had done.

For the above reasons, we dismissed the appeal with costs.

Appeal dismissed.

Reported by Jafisah Jaafar